Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-58

G. GARVIN BROWN, III, Petitioner,

v.

MARK PAUL FELSEN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEANNA E. HICKMAN
DAWSON, NAGEL, SHERMAN
& HOWARD
2900 FIRST OF DENVER PLAZA
633 SEVENTEENTH STREET
DENVER, COLORADO 80202

COUNSEL FOR PETITIONER

JULY 10, 1978

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IN THE

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OCTOBER TERM, 1978

NO. ____

G. GARVIN BROWN, III, Petitioner,

v.

MARK PAUL FELSEN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner G. Garvin Brown, III respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Tenth Circuit entered in this proceeding on April 14, 1978.

OPINION BELOW

The opinion of the Court of Appeals, and Findings, Conclusions and Order of the Bankruptcy Court for the District of Colorado, are not reported, and appear in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado. The Order of the District Court affirming the Order of the Bankuptcy Court also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 14, 1978 affirming the order of the District Court for the District of Colorado and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 17(c)(2) of the Bankruptcy Act [11 U.S.C. § 35(c)(2)] confers upon the bankruptcy court exclusive jurisdiction to determine the dischargeability of debts under Section 17(a)(2) and 17(a)(4) [11 U.S.C. § 35(a)(2) and (a)(4)], and allows the court in making its determination to look behind the face of a state court judgment.

2. Whether the bankruptcy court may admit and consider evidence extrinsic to the state court record in order to ascertain the dischargeability of the debt.

3. Whether a state court judgment silent on its face as to dischargeability is thereby res judicata on the dischargeability of the debt in bankruptcy.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11

§ 35. Debts Not Affected by a Discharge.

(Also referred to as § 17 of the Bankruptcy Act, as amended.)

The verbatim text of 11 U.S.C. § 35 is set forth in the Appendix hereto.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because a question arises under the Bankruptcy Act, as amended.

In June, 1975, the Jefferson Bank & Trust ("the Bank") commenced an action against Respondent and Petitioner in state court, the District Court in and for the County of Jefferson, State of Colorado ("the State Court").

The Bank's claims against the Respondent were based on the non-payment of certain debts owed by the Respondent to the Bank. The Bank's claim against Petitioner was based on a guaranty executed by the Petitioner in favor of the Bank, guaranteeing payment of the Respondent's indebtedness to the Bank. Petitioner filed an answer to the Bank's

complaint containing affirmative defenses to the Bank's claim and stating in pertinent part:

> 3. This Defendant [Petitioner] was induced to sign such guaranty by misrepresentations and nondisclosures of material facts by the other defendants hereto [the Respondent and his company Le Mans Motors]
> . . . .

Thereafter, Petitioner filed an Amended Answer with a Crossclaim, which specifically incorporated by reference the Answer. The Crossclaim against the Respondent was a claim for indemnity based on the guaranty. Although not asserted as a separate crossclaim, the issue of fraud by the Resondent was raised on the face of the Answer and the Amended Answer by specific incorporation.

Not only do the pleadings in the State Court record contain clear and unequivocal allegations of fraud, but the deposition of the Respondent taken in the State Court proceedings is riddled with admissions of fraud in connection with the transaction

underlying this lawsuit between the Resondent and Petitioner. (R. Vol. III, Exhibit A, Vol. IA, pp. 61-62, 71-75, 79; Vol. I-B, pp. 19-20, 36, 41-42, 75-76, 78-79, 111)[1] . Shortly after this deposition occurred, the Respondent entered into a stipulated judgment for the full amount claimed against him by Petitioner in the State Court action and the State Court entered judgment based on the stipulation ("the Judgment"). The State Court was thus relieved of the necessity of inquiring into the merits of any of the allegations of the lawsuit. Nor did it have to determine any issue of fact or law pertaining to that suit, including the nature of the obligation or its dischargeability. No evidentiary record was made in the State Court.

In or about January, 1976, one month after Judgment entered in the State Court, the Respondent filed his petition in bankruptcy. Thereafter, Petitioner

---

1. References are to the Record filed herein.

commenced an action in Bankruptcy Court pursuant to Part VII of the Bankruptcy Rules, seeking a determination that the debt owed by Respondent to Petitioner, evidenced by the Judgment, was not dischargeable on the grounds that the debt was for money obtained by false pretenses within the meaning of § 17(a)(2) of the Bankruptcy Act, as amended [11 U.S.C. § 35(a)(2)], for conversion of the property of another within the meaning of § 17(a)(2) of the Bankruptcy Act, as amended, [11 U.S.C. § 35(a)(2)], and for fraud, embezzlement, misappropriation or defalcation while acting as an officer or a fiduciary within the meaning of § 17(a)(4) of the Bankruptcy Act, as amended [11 U.S.C. § 35(a)(4)]. The Respondent answered and moved for summary judgment on the ground that the Judgment contained no finding of fraud on its face, and was therefore res judicata on the issue of dischargeability.

The Respondent's motion for summary judgment was granted. The Findings, Conclusions and Order of the Bankruptcy

Court makes note of the fact that fraud was raised as an issue in the State Court case and that no factual determination was made by the State Court. Appendix p. 24, infra. The Bankruptcy Court granted the motion for summary judgment holding that, because the Judgment did not state on its face, and examination of the State Court record did not indicate conclusively, that it was based upon fraud, the debt was dischargeable. Appendix p. 25, infra. The State Court Judgment was res judicata on the character of the liability and therefore its dischargeability under § 17 of the Bankruptcy Act, as amended. (11 U.S.C. § 35).

The District Court affirmed the determination of the Bankruptcy Court as did the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER

INTERPRETATION AND APPLICATION OF 11 U.S.C. § 35 (§ 17 OF THE BANKRUPTCY ACT, AS AMENDED)

Section 35(c)(2) of Title 11 places in the bankruptcy court the exclusive jurisdiction to determine the issue of dischargeability with respect to claims for fraud and claims allegedly arising from willful and malicious conversion of property.

The Tenth Circuit here has held that where a debt sought to be discharged in bankruptcy has been reduced to judgment in state court, the judgment and record of that proceeding are determinative of the nature of the obligation in a subsequent bankruptcy proceeding.

In so holding, the Tenth Circuit directly conflicts with the interpretation of 11 U.S.C. § 35 recently asserted by the Fourth Circuit in In re Pigge, 539 F.2d 369 (1976). The Fourth Circuit interprets 11 U.S.C. § 35 to mean that in a proceeding in bankruptcy court to determine the dischargeability of a provable debt

represented by a state court judgment, the bankruptcy court may go beyond the state court judgment and record and inquire into the circumstances surrounding the contracting of the debt on which the judgment was based. In a situation identical to that here, Pigge allows the bankruptcy court, in the exercise of its exclusive jurisdiction, to take evidence dehors the state court record in order to determine the dischargeability of the debt under § 17(a)(2) and (4) [11 U.S.C. § 35(a)(2) and (4)].

The Tenth Circuit makes no attempt to reconcile its interpretation with that of the Fourth Circuit or with those of other Circuits which are in accord with the Fourth. Rather, the Tenth Circuit relies on its earlier decision in In re Nicholas, 510 F.2d 160 (10th Cir.) cert. denied, 421 U.S. 1012 (1975), which was decided and presented to this Court for review prior to the decision in In re Pigge, supra.

Here, the Tenth Circuit states that because the Judgment was by stipulation,

it was not necessary for the State Court to inquire whether there was fraud involved in the transaction, thereby precluding the bankruptcy court from now considering the issue. It is this statement which makes the conflict with Pigge more patent. While in Pigge the suit included claims both in contract for money loaned, and fraud, the Fourth Circuit acknowledged that when the state court ruled in favor of the creditor on the contract claim, the state court did not consider and did not need to consider, the fraud count. In addition, it did not, and indeed had no jurisdiction to, determine the dischargeablity of the debt at issue because the proper forum for this issue was the bankruptcy court.

Pigge follow a long line of decisions in other circuits and district courts which have interpreted 11 U.S.C. § 35 in a manner contrary to the Tenth Circuit. The Ninth Circuit in Martin v. Rosenbaum, 329 F.2d 817 (1964), and more recently in In re Houtman, 568 F.2d 651 (1978), the Third Circuit in In re Johnson, 323 F.2d 574

(1963), and the Second Circuit in Greenfield v. Tuccillo, 129 F.2d 854 (1942) have expressly held that the bankruptcy court, in the exercise of its exclusive jurisdiction to determine dischargeability of a debt, must determine the nature of the original liability which had been reduced to judgment, and extrinsic evidence may be heard in order to ascertain the nature of the debt. See also Fierman v. Lazarus, 361 F.Supp. 477 (E.D. Pa. 1973); In re Burns, 357 F.Supp. 176 (D. Kan. 1972).

Thus, the Tenth Circuit's determination here that the Bankruptcy Court is bound by the State Court Judgment as to the character of the claim and therefore its dischargeability squarely collides with the decisions of other circuits.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS OF CONSIDERABLE PRACTICAL IMPORTANCE IN THE ADMINISTRATION OF THE BANKRUPTCY ACT AND THE JUDICIAL SYSTEM IN THE UNITED STATES.

The Tenth Circuit's opinion in this case reflects a policy determination that has ramifications for all holders of commercial paper pursuing their claims against potential bankrupts, and there are compelling reasons why a definitive interpretation of 11 U.S.C. § 35 by this Court should be provided. The interpretation of 11 U.S.C. § 35 articulated by the Tenth Circuit creates a jurisdictional conflict between state courts and bankruptcy courts and raises important issues of federal jurisdiction and procedure. Litigants, lower federal courts and state courts are urgently in need of the assistance of this Court in understanding the policy and application of 11 U.S.C. § 35.

The 1970 amendments to 11 U.S.C. § 35 added subsection (c), Appendix p. 31, infra, the interpretation of which is at issue here. The legislative history explicitly states that the objective of this amendment was that a single court, to wit, the bankruptcy court, would pass upon the question of dischargeability of particular claims. H. Rep. No. 91-1502

91st Cong., 2d Sess. 2 (1970) U.S. Code Cong. & Admin. News 1970 p. 4156. It would be the exclusive arbiter of dischargeability with respect to claims for fraud and claims arising from willful and malicious conversion of property. The decision of the Tenth Circuit ignores the specific mandate of the 1970 amendments when it holds that a state court judgment silent on its face as to dischargeability or grounds for entry is still controlling as to the nature of the obligation, and therefore its dischargeability.

The position of the Tenth Circuit has widespread implications for creditors holding commercial paper, such as notes or guaranties, and drastically alters the way they must pursue collection. The interpretation of 11 U.S.C. § 35 adopted by the Tenth Circuit forces the creditor while pursuing his claim in state court to divine the future, and the possibility of the debtor's bankruptcy, and to make certain that every judgment arising from a state court proceeding rests squarely on fraud, rather than on a breach of

contract. This reduces the incentive of a commercial creditor to settle a case and stipulate to judgment, forces the creditor to proceed on, and forces the court to try, issues of fraud because of the possibility of a future bankruptcy. Thus, even though a claim for breach of contract is uncontested, the parties must proceed on an essentially superfluous claim of fraud in order to protect against a discharge in a future bankruptcy.

Contrarily, the interpretation by the Tenth Circuit provides a wily defendant with a judicially sanctioned means of circumventing 11 U.S.C. § 35(a); he need only default or agree to a judgment in state court on any ground but fraud, and then rush into bankruptcy. This rule forces creditors to crowd the courts' already busy dockets with litigation which is in essence preventive maintenance, rather than the resolution of immediate disputes.

Although the Tenth Circuit appears to recognize the role of the bankruptcy court as the adjudicator of the federal issue of

nondischargeability, in actuality it is relying on the states and federal district courts to make that determination. The nature of the indebtedness is the critical determination for purposes of dischargeability and the Tenth Circuit rule transfers that determination to the state court, leaving to the bankruptcy court merely the formal application of U.S.C. § 35 to the state court judgment. Consequently, the Tenth Circuit treats the failure of the state court to enter judgment on nondischargeable grounds as a bar to the creditor pursuing nondischargeability in bankruptcy court, ignoring the exclusive jurisdiction of the bankruptcy court over this issue. However, the particular facts pertaining to 11 U.S.C. § 35(a)(2) or (4) may not be raised in the state court since they would not be necessary to obtaining judgment on commercial instruments. Such facts become relevant only after a bankruptcy is pending and only on the issue of dischargeability. Such facts have no bearing on whether or not one party is indebted to another and

the state court is not directly focusing on the issue of dischargeability.

The interpretation of the Tenth Circuit ignores the plain meaning of 11 U.S.C. § 35(c)(2) in favor of effectuating what to it appears to be a desireable policy of limiting the scope of review of a state court judgment by the bankruptcy court.

The state courts, at least in Colorado, are currently unwilling to take up the additional claims as the Tenth Circuit determination would have them do. In Schwartz v. Blue, ___ Colo.App. ___, 573 P.2d 941 (1977), the Colorado Court of Appeals, reiterated that the 1970 amendments gave to the bankruptcy court exclusive jurisdiction to determine whether a particular debt is nondischargeable because of fraud, false pretenses or malicious and willful acts of the bankrupt. Those factors are not passed upon by the state court.

Because the state courts will not make such a determination, and because the Tenth Circuit has stated that the

bankruptcy courts need not make that determination independently from the state judgment, a creditor is effectively denied an opportunity to have the true nature of the obligation determined.

The deep division over the policy enunciated by the Tenth Circuit and the Fourth Circuit needs the attention and resolution by this Court. The practice of limiting a suit on commercial paper to breach of contract, even though other claims may be available, is widespread. Even the courts will attempt to dispose of cases on this ground and leave undecided other issues in the interest of judicial economy. Such a practice underscores the need for a thorough examination of the problem by this Court. The resolution of this question will have immediate importance beyond the Petitioner here, and will affect and guide the action of all commercial creditors in pursuing their claims.

3. EVEN BY ITS OWN STANDARDS, THE RECORD IN THE STATE COURT AND BEFORE THE BANKRUPTCY COURT CONTAINED EVIDENCE OF FRAUD.

The decision of the Tenth Circuit allows the bankruptcy court to look at the record in the state court proceedings. That record, specifically the deposition of Respondent taken in the State Court proceedings, contains admissions of fraud by Respondent in connection with the transaction between Respondent and Petitioner underlying this lawsuit. The Tenth Circuit completely ignored this evidence in the record. Its failure to consider the evidence of fraud in the State Court record is unwarranted and the correctness of its decision, even under its own interpretation of 11 U.S.C. § 35, is suspect.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

Deanna E. Hickman
DAWSON, NAGEL, SHERMAN &
HOWARD
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202

Counsel for Petitioner

June 10, 1978

APPENDIX

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 77-2035

In the Matter of:	)	
	)	
MARK PAUL FELSEN	)	
f/d/b/a/ Le Mans	)	
Motors, Inc.	)	Appeal from the
	)	United States
	)	District Court
	)	for
G. GARVIN BROWN, III,	)	the District of
	)	Colorado
Plaintiff-Appellant,	)	(D.C. No.
	)	76-B-56)
vs.	)	
	)	
MARK PAUL FELSEN,	)	
Bankrupt,	)	

)
Defendant-Appellee.)

Submitted: March 6, 1978

on the briefs

Craig A. Christensen and Deanna E. Hickman of Dawson, Nagel, Sherman and Howard, Denver, Colorado, for Appellant.

Alex Stephen Keller of Keller, Dunievitz and Johnson, Denver, Colorado, for Appellee.

Before LEWIS, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

G. Garvin Brown, III (Brown) appeals from a final order of the District Court affirming the decision of a referee in bankruptcy discharging the debts of Mark Paul Felsen, Bankrupt (Felsen).

The debt owed Brown by Felsen was evidenced by a judgment rendered in a state court proceeding. In January, 1974, Brown executed a guaranty in favor of the Jefferson Bank and Trust (Bank), guaranteeing payment of all indebtedness of Felsen and his company, Le Mans Motors, to a limit of $350,000. Felsen and Le Mans Motors subsequently defaulted on obligations to Bank and Bank instituted an action in state court against Felsen and Le Mans, as debtors, and Brown, as guarantor.

In answer to Bank's complaint, Brown alleged that he had executed the guaranty because he had been "induced to sign such guaranty by misrepresentation and nondisclosures of material facts by defendants hereto." [R., Vol. I, at 26.] Subsequently, Brown filed an amended

answer and a cross-claim wherein he incorporated, by reference, the matters alleged in his original answer and, by cross-claim, prayed for reimbursement of any sums he might be liable for on the guaranty. The state action was not tried inasmuch as the Bank, Felsen and Brown entered into a settlement agreement, which was incorporated into a judgment. The parties' stipulation (agreement) provided for judgment in favor of Bank and against Felsen, Brown and Le Mans Motors, jointly and severally, in the amount due and owing Bank and judgment in favor Brown against Felsen and Le Mans for the same amount. No evidentiary record was made of the state court proceedings because the basis of the judgment was the parties' agreement.

In January, 1976, Felsen filed a petition for voluntary bankruptcy. Brown sought to have the judgment rendered in his favor against Felsen in the state court declared nondischargeable, on the ground that he had become Felsen's

guarantor only by reason of Felsen's fraudulent inducement and misrepresentations. Brown contended that application of Section 17(a)(2) of the Bankruptcy Act, 11 U.S.C. 35, prevented discharge. Felsen asserted, in response, that since there had been no finding of fraud in the state court proceedings, the judgment was res judicata. A stipulated record of the state court proceedings, including the pleadings and judgment, was filed in the bankruptcy proceedings.

The referee allowed the discharge, holding that there had been no showing of fraud in the aforesaid state court proceeding:

> As the judges of this Court have unanimously interpreted those guideliness since pronounced, when a debt has been reduced to judgment in a state court, and the record of that state court proceeding is presented to a Bankruptcy Court, the Bankruptcy Court is bound to apply the results of the state court judgment to a complaint to

> determine the dischargeability of the debt founded upon the state court judgment. Not only is the Bankruptcy Court bound by the state court judgment when the state court record is complete, the Bankruptcy Court is also specifically interdicted by Raley from considering any evidence outside that record. Thus, this case must turn on that record stipulated by the parties.
>
> [R., Vol. I, at 46.]

The referee in bankruptcy rendered his decision on the basis of the stipulated record which revealed no fraudulent activity on the part of Felsen. On appeal to the District Court, the dischargeability of the judgment was affirmed.

On appeal, Brown contends that the referee and the District Court erred in allowing discharge of the judgment debt simply because the judgment and the record from which it arose do not indicate facially that the judgment was based on fraud.

Judgments rendered against a bankrupt are not classified or distinguished from other provable debts and they will be discharged unless they fall within the special exceptions delineated in Section 17(a) of the Bankruptcy Act. 8 Remington on Bankruptcy 3302, at 1522. Section 17 does prevent a bankrupt's debt from being discharged if the debt was obtained as a result of false pretenses or false representations.

I.

Brown argues that the state court record contains allegations and evidence of fraud sufficient to raise the issue of fraud relating to the debt evidenced by the judgment. He urges that this court require that the referee undertake a de novo hearing on this issue. We decline to do so.

In light of the parties' stipulation, it was not necessary for the state court to inquire whether the guaranty had been fraudulently induced. There is no record

in existence regarding the alleged fraud. The sole basis on which Brown can now rely in his assertion that fraud motivated him to execute the guaranty is the self-serving matter contained in his answer to the Bank's complaint. This, and this alone, constitutes the sole reference to any possible fraud in the dealings between Brown and Felsen. There was no mention of any fraudulent inducement problem in the stipulation entered into between the parties. The stipulation was, of course, embodied in the judgment entered in the state court.

Brown is bound by the state court judgment in that a consent decree has the same force and effect as any other judgment and is considered to be a final adjudication on the merits. Securities and Exchange Commission v. Thermodynamics, Inc., 319 F. Supp. 1380 (D. Colo. 1970), aff'd, 464 F.2d 457 (10th Cir. 1972), cert. denied, 410 U.S. 927 (1973). Once it is shown that the parties did, in fact, consent to rendition of a judgment, such a

judgment is deemed to be valid and binding. Hot Springs Coal Co. v. Miller, 107 F.2d 677 (10th Cir. 1939). In the instant case there is nothing in the stipulation indicating that the Brown-Felsen guaranty was induced by fraudulent representations. Parties involved in a consent judgment waive their rights to litigate the issues involved in the case as posed by the pleadings. United States v. Armour and Co., 402 U.S. 673 (1971). Thus, we hold that Brown cannot now raise the issue of fraud. Furthermore, Brown's allegation of fraudulent misrepresentations contained in his answer in the state court proceedings does not adequately raise the issue of fraud for bankruptcy consideration. In addition, his casual answer does not meet the requirements of Rule 9, Colorado Rules of Civil Procedure, that all averments of fraud and the circumstances constituting fraud must be stated with particularity.

There is nothing in this record which indicates that the stipulation reached in

settling the litigation in the state court proceeding between Bank, Brown and Felsen was in any manner induced by fraud. Thus, we must reject Brown's contention that the pleadings raise an issue of fraud. In like manner, we hold that Brown is not entitled to a de novo hearing on the alleged fraud issue.

II.

Brown contends that even if fraud was not adequately raised in the state court proceedings, the question of dischargeability is within the sole province of the Bankruptcy Court and that, accordingly, the state court judgment cannot be held to be res judicata on this issue.

The determination as to whether a debt is the result of a fraudulent transaction is, of course, within the ambit of the Bankruptcy Act. However, in the instance where a debt has been reduced to judgment, a referee in bankruptcy generally will not go beyond the record of the proceedings in

which the judgment was rendered in order to ascertain if discharge will lie:

> Where, however, a liability has been prosecuted to judgment, the record is usually held decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by the introduction of parol evidence except in the case of ambiguity. In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the record in the action must show that fraud and deceit were the 'gist and gravamen' of the action.

Collier on Bankruptcy, Vol. IA, s 17.16 (4), at 1643-6.

This court has rendered two opinions dealing with the discharge of a judgment creditor in a bankruptcy proceeding. They hold that the record of the proceeding in which a judgment was rendered prior to bankruptcy proceedings will generally control in a subsequent bankruptcy proceeding.

In In re Nicholas, 510 F.2d 160 (10th Cir. 1975), cert. denied, 421 U.S. 1012 (1975), a creditor sued to prevent discharge of a default judgment awarded him in a state court proceeding. The creditor claimed that discharge should not lie, inasmuch as the original liability upon which the judgment was based had been obtained through fraud and false pretenses. In support of his contention the creditor filed an affidavit which contained alleged information that the debtor had, in essence, "cheated" the creditor. This court held that where an examination of the entire record and the judgment does not evidence that the liability was predicated on fraud, the referee in bankruptcy must refuse to permit the judgment creditor to introduce extrinsic evidence to the effect that the liability was, in reality, based on fraud. We there observed:

> The record of the proceedings in the state court clearly indicated that the liability was one for damages arising out of

> breach of contract and not fraud. Under such circumstances, there was no need to resort to extrinsic evidence.
>
> 510 F.2d, at 164.

We again articulated the rule that a state court record and judgment will control in a subsequent bankruptcy action in In re Vickers, an unpublished opinion (No. 76-2175, decided August 19, 1977). We there observed:

> The rule in this circuit is that when a debt sought to be discharged has been reduced to judgment in state court, the nature of the obligation is to be determined on the basis of the record and the judgment in that action. Absent ambiguity as to the nature of the claim, no resort may be had to extrinsic evidence.
>
> Ibid, at 6.

WE AFFIRM.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM - April 14, 1978

Before Honorable David T. Lewis, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

IN THE MATTER OF:	)	
	)	
MARK PAUL FELSEN,	)	
	)	
Bankrupt,	)	
	)	
G. GARVIN BROWN, III,	)	J U D G M E N T
	)	No. 77-2035
Plaintiff-Appellant,	)	
	)	(D.C. No.
	)	76-B-56)
vs.	)	
	)	
MARK PAUL FELSEN,	)	
	)	
Defendant-Appellee.	)	

This cause came on for consideration on the record on appeal from the United States District Court for the ----- District of Colorado and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed

HOWARD K. PHILLIPS, Clerk

J-3 5/75

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

G. GARVIN BROWN, III,	)	Civil Action
	)	No. 76-B-56
Plaintiff,	)	
	)	
vs.	)	O R D E R
	)	
MARK PAUL FELSEN,	)	
	)	
Bankrupt.	)	

THIS MATTER comes on this day for hearing on Plaintiff's Petition for Review of a judgment by the Bankruptcy Court determining that the debt from the Bankrupt to the Plaintiff is dischargeable. The parties waived the presence of a court reporter.

The Court having heard the arguments of counsel and being familiar with In re Nicholas, 510 F.2d 160 (Tenth Circuit), and the Court having provided counsel with the case of Teutsch v. Vickers, No. 76-2175, decided August 19, 1977 (Tenth

Circuit), and the Court now being fully advised,

DOTH HEREBY AFFIRM IN ALL RESPECTS the judgment and Order of the Bankruptcy Court herein.

DATED at Denver, Colorado, this 19th day of October, 1977.

/s/ Fred M. Winner
Fred M. Winner
United States District
Judge

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLORADO

In re	)	
	)	
MARK PAUL FELSEN,	)	
Bankrupt.	)	
	)	
G. GARVIN BROWN, III,	)	BANKRUPTCY
	)	
Plaintiff,	)	NO. 76 B 56
	)	
vs.	)	
	)	
Bankrupt,	)	
MARK PAUL FELSEN,	)	
Bankrupt,	)	
	)	
Defendant.	)	

FINDINGS, CONCLUSIONS AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Appearances: Craig A. Christensen,
Attorney for the Plaintiff
Alex Stephen Keller,
Attorney for the Defendant

This matter arises out of a complaint filed by the plaintiff (Brown) seeking to have a debt owed by the Bankrupt defendant (Felsen) declared nondischargeable. The complaint filed in this Court is in three Claims for Relief, the first of which avers that Felsen induced Brown into guaranteeing a loan to Felsen and Felsen's business, LeMans Motors (LeMans), by the Jefferson Bank and Trust (Bank). It is further averred that the inducement which procured Brown's guaranty was based on false representations. Finally, it is set forth that Brown's guaranty was called upon by the bank, and that demand ultimately resulted in the bank's obtaining a judgment against Brown in the amount of $298,000.00. The first claim for relief is concluded upon the assertion that Felsen's fraudulent inducement and its subsequent results amount to the obtaining of money or property by false pretenses or false representations within the meaning of §17a(2) of the Bankruptcy Act.

The second claim for relief avers that the indebtedness to Jefferson Bank and Trust and the indebtedness arising out of the bank's judgment against Brown, and a judgment Brown obtained against Felsen for indemnification were debts created by the willful and malicious conversion of property of another by Felsen. The basis for the claim is an averment that Felsen sold automobiles upon which the Bank had a security interest, and which security interest was subrogated to Brown.

The third claim for relief states that Felsen's auto sales previously complained of, made while Felsen was president of LeMans, created a liability by fraud, embezzlement, misappropriation or defalcation while acting as an officer within the meaning of § 17a(4) of the Bankruptcy Act. On the basis of the three claims for relief, Brown sought judgment declaring that the liabilities of Felsen to Brown arising out of Brown's guaranty of the Bank's loan are not dischargeable.

Felsen answered the complaint by denying every averment except that relating to the entry of the judgment by the Bank against Brown. In addition, three affirmative defenses were presented, only one of which is pertinent. In his third affirmative defense, Felsen stated:

> (T)he Civil Action in the District Court of the State of Colorado, City and County of Denver, (sic) referred to in the Complaint, has been finally concluded and determined. The same is res adjudicata (sic) and no finding of fraud was contained therein.

Subsequent to the filing of the answer, Brown filed a motion seeking to have the Court strike the three affirmative defenses.

For reasons not pertinent to the issues now under consideration, the motion to strike was denied by the Court, and the matter was set for pre-trial conference. The Court ordered that counsel appear at

the pre-trial conference prepared to discuss the applicability of Raley v. Nicholas, 510 F. 2d 160 (10th Cir., 1975).

After the pre-trial conference, counsel for both parties filed a stipulated record of the state court proceedings which contained the pertinent pleadings and the state court judgment. Thereafter, Felsen filed the instant motion for summary judgment relying upon the state court record and the holding in Raley v. Nicholas, supra. After oral argument, it appears to the Court that there are no genuine issues as to any material fact, and that this matter should be decided upon the motion for summary judgment.

Applicability of Raley and its result to the case at issue appears inescapable. While the plaintiff insists that there are factual distinctions present in this case which make Raley inapposite, I cannot agree. Moreover, as I view the situation, I have no choice but to enter judgment in

favor of the defendant declaring the debt in question dischargeable.

Let us first examine the law. No matter what the rule may be in other jurisdictions, in this Circuit the guidelines to be followed in cases of this nature are set forth immutably in Raley. As the judges of this Court have unanimously interpreted those guidelines since pronounced, when a debt has been reduced to judgment in a state court, and when the record of that state court proceeding is presented to a Bankruptcy Court, the Bankruptcy Court is bound to apply the results of the state court judgment to a complaint to determine the dischargeability of the debt founded upon the state court judgment. Not only is the Bankruptcy Court bound by the state court judgment, when the state court record is complete, the Bankruptcy Court is also specifically interdicted by Raley from considering any evidence outside that record. Thus, this case must turn on that record stipulated by the parties.

Examination of the state court record indicates that the action was originally commenced by the Bank against Brown and Felsen as codefendants. The original complaint was based entirely on the nonpayment of certain notes, including the note guaranteed by Brown which gives rise to the instant action. Both defendants answered denying the debt, and Brown raised the affimative defense that he was induced to sign the guaranty by "misrepresentations and nondisclosures of material facts by the other defendants hereto". Brown then filed a cross-claim in which he asserted the theory that if he were held liable on the note to the Bank he was entitled to indemnification from Felsen. After a period of time, the parties in the state court entered into a stipulation for the entry of judgment.

By the terms of the stipulation, Brown conceded liability to the Bank upon the complaint and Felsen conceded liability to Brown upon the cross claim. Apparently without further hearing, the state court

entered judgment against both parties in accordance with the stipulation. Nowhere in the stipulation or in the judgment is it indicated that the judgment entered against Felsen was based upon fraud or anything other than upon Felsen's stipulation that judgment be entered against him. Moreover, examination of the entire state court record indicates to me that the liability resulting in the judgment was not based upon fraud.

The only reference to fraud found in the state court record is the previously quoted affirmative defense. Notwithstanding, the cold record fails to disclose the state court's reliance upon the defense as the basis for the judgment. Since Raley will not permit me to go outside the record, I have no choice but to conclude that the liability sought to be discharged is not of the sort made nondischargeable by any provision of § 17 of the Bankruptcy Act. Accordingly, it is

ORDERED that the motion for summary judgment be and the same is hereby granted, and it is

FURTHER ORDERED that the debt owed by the Bankrupt, Mark Paul Felsen, to G. Garvin Brown, III, arising out of a judgment entered in the District Court in and for the County of Jefferson, State of Colorado, be and the same is hereby determined to be dischargeable.

DATED: December 16, 1976

BY THE COURT:

John P. Moore
Bankruptcy Judge

§35. Dischargeability of debts--Debts not affected by a discharge. (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankrupty: Provided, however, That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or

fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the

property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of section 104 of this title; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than

conversion as excepted under clause (2) of this subdivision.

(b) The failure of a bankrupt or debtor to obtain a discharge in a prior proceeding under this title for any of the following reasons shall not bar the release by discharge in a subsequent proceeding under the title of debts that were dischargeable under subdivision (a) of this section in the prior proceeding: (1) discharge was denied in the prior proceeding solely under clause (5) or clause (8) of subdivision (c) of section 32 of this title; (2) the prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs. If a bankrupt or debtor fails to obtain a discharge in a proceeding under this title by reason of a waiver filed pursuant to section 32(a) of this title or by reason of a denial on any ground under section 32(c) of this title other than clause (5) or clause (8) thereof, the debts provable in such proceeding shall not be released by a discharge granted in any

subsequent proceeding under this title. A debt not released by a discharge in a proceeding under this title by reason of clause (3) of subdivision (a) of this section may nevertheless be dischargeable in a subsequent bankruptcy proceeding.

(c) (1) The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt.

(2) A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision (a) of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 32 of this title and, unless an application is timely filed, the debt shall be discharged. Notwithstanding the preceding sentence, no application need be filed for a debt excepted by clause (8) if a right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if

either the bankrupt or a creditor submits a signed statement of an intention to do so.

(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof. A creditor who files such application does not submit himself to the jurisdiction of the court for any purposes other than those specified in this subdivision (c).

(4) The provisions of this subdivision (c) shall apply whether or not an action on a debt is then pending in another court and any party may be enjoined from instituting or continuing such action prior to or during the pendency of a proceeding to

determine its dischargeability under this subdivision.

(5) Nothing in this subdivision shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists.

(6) If a bankruptcy case is reopened for the purpose of obtaining the orders and judgments authorized by this subdivision no additional filing fee shall be required.